March, 1995

HONOR ROLL

425th Session, Basic Law Enforcement Academy - November 1, 1994 through January 27, 1995

President: Officer Erik D. Sulonen - Bainbridge Island Police Department
Best Overall: Officer Chris R. Sylvain - Oroville Police Department
Best Academic: Deputy Clinton Bergeron - Kitsap County Sheriff's Department
Best Firearms: Officer James A. Bowen - Tacoma Police Department

****

Corrections Officer Academy - Class 205 - January 9 through February 3, 1995

Highest Overall: Officer Kristine A. Baker - King County Division of Corrections
Highest Academic: Officer Denise R. Blahak - King County Division of Corrections
Highest Practical Test: Officer Kristine A. Baker - King County Division of Corrections
Highest in Mock Scenes: Officer Randy J. Blakenship - Olympia Corrections Center
Highest Defensive Tactics: Officer Randy J. Blakenship - Olympia Corrections Center

****

Corrections Officer Academy - Class 206 - January 9 through February 3, 1995

Highest Overall: Officer Marylin R. Hansen - Benton County Corrections
Highest Academic: Officer David E. Stinson, Jr. - King County Division of Corrections
Highest Practical Test: Officer Marylin R. Hansen - Benton County Corrections
Officer Lynn Greenough Harty - Spokane County Jail
Highest in Mock Scenes: Officer Matthew C. Warnke - King County Division of Corrections
Highest Defensive Tactics: Officer David E. Stinson, Jr. - King County Division of Corrections
Officer Marylin R. Hansen - Benton County Corrections

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WASHINGTON STATE SUPREME COURT

INFORMANT'S TIP JUSTIFIES TERRY STOP OF SUSPECTED DRUG DEALER

State v. Garcia, 125 Wn.2d 239 (1994)

Facts and Proceedings: (Excerpted from Supreme Court opinion)

> A Yakima police officer, with 2 years experience in narcotics, and a reserve officer were on patrol in a high narcotics business area in downtown Yakima. They saw a citizen parked in a pickup with Defendant in the passenger seat. The citizen was known to the officer for two reasons. First, the officer had heard five or six fellow officers describe the citizen as a frequent visitor in that area who often pointed out to the police persons carrying or dealing drugs. Second, the citizen, a few months earlier, had identified to this particular officer a person carrying drugs which resulted in an arrest.
>
> The citizen began gesturing to the officers while both he and Defendant were in the pickup. The officer approached the vehicle, but when the gesturing stopped, he withdrew and resumed patrol. Minutes later the citizen drove behind the marked patrol car and began honking. He told the officer that Defendant had told him he was carrying drugs and had entered the adjacent Blue Banjo Tavern.
>
> After entering the tavern, the officers observed Defendant with a known prostitute who appeared to be offering Defendant what appeared to be a small box of some value. Defendant was making a gesture of refusal.
>
> The uniformed officers asked Defendant if he would go outside and talk with them. Defendant consented. The officer told Defendant he believed he was carrying narcotics and asked if he could search him. Defendant consented. A cursory search produced $145, mainly in $10 and $20 bills, amounts known to be common to drug dealers and uncommon to regular patrons of that tavern.
>
> Noticing an unusual bulge, the size of a tennis ball, in Defendant's crotch, the officer told the reserve officer that he believed that bulge might be narcotics whereupon Defendant started to drop his pants. This was on a public street in daylight. The officer stopped Defendant from lowering his pants and put him, without handcuffs, into the back of the patrol car after first being certain there were no drugs in the back seat. They drove two blocks to the

police station where the officer intended a more complete search. When they removed Defendant from the car they discovered a tennis ball sized wad stuffed in the armrest. It contained 46 baggies of cocaine and 2 bags of heroin.

ISSUE AND RULING: Did the citizen informant's tip justify the officers' initial Terry stop of Garcia? (ANSWER:Yes) Result: reinstatement of Yakima County Superior Court convictions for possessing cocaine with intent to deliver and possessing heroin (Division III of the Court of Appeals, in an unpublished opinion, had earlier reversed the convictions -- that earlier Court of Appeals decision has been reversed by this Supreme Court decision).

ANALYSIS: (Excerpted from Supreme Court opinion)

> Defendant consented to the search so the only issue is the validity of the initial investigative restraint. Did the officer have "'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'"? Considering the totality of the circumstances, the inquiry is whether there "is a substantial possibility that criminal conduct has occurred or is about to occur."
>
> Here the question in turn depends on the necessary indicia of reliability of the "tip" from the citizen. The trial court was careful to distinguish this person from a paid or undercover informant. The general rules applicable are well articulated in Kennedy **[State v. Kennedy, 107 Wn.2d 1 (1986) Dec. '86 LED:01]**. Without any analysis, the Court of Appeals majority simply concluded: "There is insufficient evidence the informant [sic] demonstrated credibility or his information was reliable."
>
> As Kennedy points out, information from a "citizen" "does not require a showing of the same degree of reliability as the informant's tip" since it does not come from a "professional" informant.
>
> Here there are factual similarities to Kennedy. The officer was experienced in narcotics cases and familiar with the particular location as a high drug dealing area. The intrusion was minimal and consent to search freely given. The officer recently had made an arrest based on information from the citizen. The officer knew from five to six fellow officers that the citizen frequently pointed out dealers or possessors of drugs.

> It is quite apparent there were sufficient indicia of reliability to provide an objective measure of reasonableness. The carefully crafted findings of the trial court fully support its denial of suppression.

[Some citations omitted]

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **"MENTAL INCAPACITY" UNDER RAPE STATUTE MEANS LACK OF MEANINGFUL UNDERSTANDING OF NATURE OR CONSEQUENCES OF SEXUAL INTERCOURSE** -- In State v. Ortega-Martinez, 124 Wn.2d 702 (1994), the State Supreme Court rejects defendant's argument, among others, that the State failed to prove "mental incapacity" of his victim in his trial for second degree rape. Defendant had met and had sex with a woman of age 30 with an IQ in the 40's. At his trial and on appeal, he argued that the evidence was insufficient to convict on the "mental incapacity" element of second degree rape because the victim's testimony that she attempted to prevent the act showed that she understood the nature and consequences of the act.

The second degree rape statute -- RCW 9A.44.050(1)(b) -- proscribes, in the alternative, sexual intercourse with a person who is "mentally incapacitated". In turn, RCW 9A.44.010(4) defines "mental incapacity" as a condition which "prevents a person from understanding the nature and consequences of the act of sexual intercourse . . ." Justice Utter's opinion, joined by five other justices, describes as follows what is required to prove the "mental incapacity" element of second degree rape:

> The key to a proper interpretation of RCW 9A.44.010(4) is a sufficiently broad interpretation of the word "understand". Evidence showing that a victim has a superficial understanding of the act of sexual intercourse does not by itself render RCW 9A.44.010(4) inapplicable. A finding that a person is mentally incapacitated for the purposes of RCW 9A.44.010(4) is appropriate where the jury finds the victim had a condition which prevented him or her from *meaningfully* understanding the nature or consequences of sexual intercourse.
>
> A meaningful understanding of the nature and consequences of sexual intercourse necessarily includes an understanding of the physical mechanics of sexual intercourse. See RCW 9A.44.010(1) (broadly defining the physical acts considered to be sexual intercourse). It also includes, however, an understanding of a wide range of other particulars. For example, the nature and consequences of sexual intercourse often include the development of emotional intimacy between

> sexual partners; it may under some circumstances result in a disruption in one's established relationships; and, it is associated with the possibility of pregnancy with its accompanying decisions and consequences as well as the specter of disease and even death. While the law does not require an alleged victim to understand any or all of these particulars before a defendant can be considered insulated from liability under RCW 9A.44.050(1)(b) for having had sexual intercourse with a mentally incapacitated individual, all of the above are elements of a meaningful understanding of the nature and consequences of sexual intercourse and are important for a trier of fact to bear in mind when it is evaluating whether a person had a condition which prevented him or her from having a meaningful understanding of the nature or consequences of the act of sexual intercourse. They are especially important to acknowledge in prosecutions involving the mentally disabled because such individuals may have a condition which permits them to have a knowledge of the basic mechanics of sexual intercourse, but no real understanding of either the encompassing nature of sexual intercourse or the consequences which may follow.
>
> . . .
>
> In assessing whether the State has met its burden of showing that a victim had a condition which prevented him or her from understanding the nature or consequences of sexual intercourse at the time of an incident, the jury may evaluate, in addition to that person's testimony regarding his or her understanding, other relevant evidence such as the victim's demeanor, behavior, and clarity on the stand. It may also take into consideration a victim's IQ, mental age, ability to understand fundamental, nonsexual concepts, and mental faculties generally, as well as a victim's ability to translate information acquired in one situation to a new situation.

Applying this test to the fact of this case [**NOTE: the Court's extensive discussion of the facts of this case has been omitted from this <u>LED</u> entry for space reasons; anyone seeking to understand the full import of this decision will need to read the Court's full opinion]**, the Court rules that the State proved mental incapacity.

In a concurring opinion joined by two other justices, Justice Andersen asserts that Justice Utter's lead opinion reads the term "mental incapacity" too broadly. He states:

> I disagree with the majority opinion to the extent that it can be interpreted to require a trial court to conduct an

> in-depth review of the level of an allegedly disabled victim's understanding of the emotional impact that sexual intimacy can cause, of the possibility that such intimacy may have an effect on existing relationships, and of the extent of the victim's knowledge of the "specter of disease and even death" associated with the possibility of pregnancy. To my view this "evaluation" is unwarranted under the facts of this case.

Result: Skagit County Superior Court conviction for second degree rape affirmed.

(2) **DRUG CRIME ACCOMPLICES GET SENTENCE ENHANCED UNDER UCSA'S DRUG FREE ZONE PROVISION** -- In State v. Silva-Baltazar, 125 Wn.2d 472 (1994) the State Supreme Court rules that RCW 69.50.435 and RCW 9.94A.310(5), which provide for a 24-month increase in the standard sentencing range for certain controlled substances crimes committed in certain specified locations (including school zones, school buses, school bus routes, public parks, public transit vehicles, and public transit stop shelters) apply to accomplices (such as the defendants in this case) who are themselves present in one of the specified locations at the time the criminal activity occurs. The Court leaves to a future case its view on whether the enhancement provision applies to accomplices who are not themselves present within the drug free zone when the person with whom they are in complicity (i.e., their fellow accomplice) carries out the prohibited drug activity within the boundaries of a drug free zone. Result: affirmance of Yakima County Superior Court: (1) convictions of Jose Luis Silva-Baltazar and Antonio Lopez Mendoza for possession of a controlled substance with intent to deliver, and (2) sentence enhancements based on the commission of the crimes within 1,000 feet of a school bus stop. **LED EDITOR'S NOTE: This decision is consistent with that in State v. Graham, 68 Wn. App. 878 (1993), a published opinion not previously reported in the LED, in which Division III of the Court of Appeals upheld a drug sentence enhancement for Eric Leon Graham under the same theory as here.**

(3) **SUPERIOR COURT DIRECTIVE THAT DV ARRESTEES BE DETAINED WITHOUT BAIL UNTIL FIRST APPEARANCE IS HELD LAWFUL** -- In Westerman v. Cary, 125 Wn.2d 277 (1994) the State Supreme Court holds that a general Spokane County District Court order that all domestic violence (DV) arrestees be detained in jail without bail pending their first appearance in court does not violate either the state or the federal constitution. The asserted constitutional bases for the unsuccessful challenge to the general order included -- (1) the right to post bail, (2) the right to substantive due process, and (3) the right to equal protection of the laws. Result: affirmance of Spokane County District Court order directing detention without bail of DV arrestees until their first court appearance.

(4) **EXPERT TESTIMONY RE -- (1) GAMMA MARKER TESTING OF BLOOD AND (2) PCR/DNA TYPING -- FOR ID PURPOSES HELD ADMISSIBLE** -- In State v. Gentry, 125 Wn.2d 570 (1995) the State Supreme Court rejects a capital murder defendant's appeal and finds admissible in the face of a "Frye test" challenge certain scientific evidence. The Court rules that the PCR (polymerase chain reaction) technique used in this case to implement the theory of DNA typing of blood for ID purposes is generally accepted in the scientific community, as is the "slide method" used to implement the "gamma Marker" testing of blood for the same purposes. Accordingly, the blood testing evidence met the "Frye test," the Court holds.

The Gentry decision also rejects defendant's appeal on numerous other issues. The other issues include: (1) whether there was sufficient evidence of "premeditation" to support a first degree murder conviction; (2) whether the investigating, affiant-officer misrepresented the facts in his application for a search warrant; (3) whether the jury was properly instructed on aggravating and mitigating circumstances in the death penalty phase of the trial; (4) whether victim impact evidence was properly admitted; and (5) whether the death sentence met proportionality review standards.

Result: affirmance of Kitsap County Superior Court convictions and sentence of death for aggravated first degree murder and felony murder.

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WASHINGTON STATE COURT OF APPEALS

LANDLORD'S CONSENT TO SEARCH INVALID; ALSO, STATE'S CLAIM OF "OPEN VIEW" WITH FLASHLIGHT FAILS; AND NO PC ON LANDLORD'S STATEMENT ABOUT SMELL

State v. Rose, 75 Wn. App. 28 (Div. I, 1994)

Facts and Proceedings: [Excerpted from majority opinion]

> Rose rented a 5-acre lot from Yarton pursuant to a 6-month written lease. The property contained a mobile home, a large garage and a smaller shed. The access route to the rental property was a 250-foot-long driveway which branched off a private road leading to Yarton's residential property. The driveway to the rented property ended in a gravel parking area. The parking area was bordered by the garage on the right and the mobile home on the left. The shed was about 19 yards behind the mobile home beyond a grassy area located behind the home. The shed was located at the edge of a heavily wooded area. The view of the shed from the

parking area and mobile home was partially obscured by branches of trees in the wooded area. A gravel path led from the parking area to the front porch of the mobile home. There was no discernible path leading to the shed.

In addition to the written lease, there was an oral agreement wherein Yarton was entitled to use part of the garage for storage. Yarton agreed to perform maintenance on the property, such as mowing the grass and cutting brush. Yarton was not required to give Rose notice before entering the property for these purposes.

On October 28, 1991, Yarton served Rose with an eviction notice and told him to vacate within 30 days. Rose agreed to leave at the end of November. His rent was fully paid for the month of November. On November 18, Yarton came onto the property to store some items. While there he noticed the mobile home was in a state of disrepair. Yarton walked around to assess the condition of the mobile home and out-buildings. Upon approaching the shed he noticed the odor of what he believed to be marijuana.

Yarton reported his suspicion to the police. The report was investigated by [a deputy] of the Snohomish County Sheriff's office. [The deputy] learned from Yarton that Yarton had access to the property because of the shared storage and the maintenance tasks he performed there. Based on this information, [the deputy] concluded that Yarton had the authority to consent to a search of the property.

Yarton and [the deputy] drove up to the property and then walked together to the shed, which was found to be locked. From there, [the deputy] could smell marijuana and he noticed electricity lines and a garden hose running into the shed. [The deputy] walked back to the mobile home, looking in a back window as he did so. He walked around to the front of the home, climbed the steps and knocked on the door. From there he could see into the living room through a window. On the table inside he could see marijuana, packaging materials and a gram scale. A dog could be heard barking from inside the home. [The deputy] testified that he did not shine his flashlight through the window; Yarton testified that he did. The trial court believed Yarton's testimony, perhaps because this visit to the property occurred in the nighttime hours.

Shortly thereafter two young men pulled up and claimed to be looking for Rose. [The deputy] became suspicious when he noticed the men had bolt cutters, and decided to "Mirandize"

> them. After waiving their rights, the men revealed that they were on the property to steal Rose's marijuana growing operation.
>
> Based on his observations while on the property, [the deputy] obtained a telephonic search warrant. On serving the warrant, police found a complete growing operation and 14 pounds of marijuana. Rose was charged with possession of marijuana with intent to manufacture or deliver. At a pretrial hearing the trial court suppressed the evidence obtained.

[Officer's name deleted]

ISSUES AND RULINGS: (1) Did the landlord have actual authority to consent to the search? (ANSWER: No); (2) Did the landlord have reasonably apparent authority to consent to the search? (ANSWER: No);(3) Under all of the facts, including the fact of the use of the flashlight to look inside the mobile home, were the officer's observations exempt from constitutional search and seizure restriction under the "open view" doctrine? (ANSWER: No. Note: there is a dissenting opinion on this issue); (4) Did the landlord's statement, standing alone, about smelling possible marijuana provide probable cause to search Rose's premises? (ANSWER: No) Result: Snohomish County Superior Court suppression order affirmed.

ANALYSIS BY MAJORITY:

(1) No Actual Consent Search Authority In Landlord

The Court of Appeals notes that the general rule is that where a tenant is in undisputed possession of rental property, as here, a landlord has no actual authority to consent to a search of that property. The Court then rejects the State's argument that this case called for an exception to the general landlord-tenant rule based on the landlord's right to come on the property for certain purposes. The Court declares in this regard:

> The agreement between Rose and Yarton restricted Yarton's right of access to specified tasks in specified areas. We refuse to transform this limited consensual relinquishment of privacy by Rose into a general waiver of his reasonable expectation of privacy. Accordingly, we hold that Yarton may have entered the premises initially for legitimate purposes of storage, maintenance or inspection on November 18, 1991, but that he had no actual authority to consent to a police search on the property.

(2) No Apparent Authority To Consent To The Search

A third-party consent search will be upheld if an officer reasonably believed that a consenting third party had authority to allow a search, even if the third party did not actually have such authority. However, as the Court explains, this "apparent authority" rule applies only where the mistaken reasonable belief is a mistake as to the facts, not where the mistake is one as to the law. The Court declares that any mistake here by the officer was one of law, and therefore strikes down the search:

> [T]his case involves a mistake of law, not a reasonable misapprehension of fact. We conclude that [the deputy's] trip to the locked shed constituted an unlawful search. The locked shed was within the curtilage of the home. The route to the shed was not impliedly open to the public. We affirm the trial court's conclusion that Yarton had no actual or apparent authority to consent to [the deputy's] search of the premises. The grow operation and marijuana found in the locked shed were properly suppressed in that the search warrant for the shed was based on illegally obtained evidence.

[Citations omitted]

(3) No "Open View"

The majority judges reject the State's argument that the officer's observations came within the "open view" rule and therefore did not exceed search and seizure restrictions. The majority judges assert:

> An open view observation occurs:
>
> > when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a "search" within the meaning of the Fourth Amendment.
>
> . . . An "open view" observation does not constitute a "search" under either the Fourth Amendment or under the state constitution.
>
> It is well established that police officers on "legitimate business"
>
> > may enter areas of the curtilage which are impliedly open, such as access routes to the house. In so doing they are free to keep their eyes open. An officer is

> permitted the same license to intrude as a reasonably respectful citizen. However, a substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy.

Consequently, the issue here is whether [the deputy] "substantially or unreasonably" departed from the normal access route to the mobile home or employed "a particularly intrusive method of viewing" when he peered into the back window of the home and shone a flashlight into the front window of Rose's home.

The Seagull **[State v. Seagull, 95 Wn.2d 898 (1981) Nov. '81 LED:02]** court considered several factors to test the intrusiveness of the observation, including whether the officer: (1) spied into the house; (2) acted secretly; (3) approached the house in daylight; (4) used the normal, most direct route to the house; (5) attempted to talk with the resident; (6) created an artificial vantage point; and (7) made the discovery accidentally.

A consideration of the Seagull factors supports the trial court's suppression ruling here. The two most notable factors are [the deputy's] first going to the shed located some 19 yards in back of the mobile home and then spying into the back and front windows of the home and creating an artificial vantage point by using a flashlight to see into Rose's living room.

The State ignores the trip to the shed and argues that no unreasonable intrusion occurred when [the deputy] peered into the windows of Rose's residence. We disagree, even if it could be said that [the deputy's] observations as he peered into the interior of the home were untainted by his illegal trip to the locked shed moments earlier.

. . .

Although the front window on Rose's mobile home was covered with only a ragged curtain, there was nonetheless some attempt to prevent casual observation of the interior of the home. In addition, the mobile home was located at the end of a very long driveway which was connected to a private road, and the search occurred at night. . . . We find that [the deputy's] peering into the windows of Rose's residence during the nighttime hours with the aid of a flashlight

> constituted an unreasonable intrusion into Rose's reasonable expectation of privacy.
>
> The State also argues that the use of a flashlight by [the deputy] did not create an artificial vantage point. We disagree.
>
> Washington case law indicates that the use of a flashlight in an automobile search is constitutional. However, a search by an officer who shone a light through a minute crack in the wall in order to observe items within a locked storage building was invalidated in State v. Tarantino, [a North Carolina decision].
>
> The invalidation of [the deputy's] search is even more compelling than in Tarantino because of the enormous expectation of privacy with regard to the interior of a personal residence. This is not simply a case wherein the flashlight illuminated what could normally have been seen during the day. Whether we live on a city lot or on acreage in the country, we do not expect that the police will perform exploratory searches in the nighttime hours by peering into the interiors of our homes by the aid of a flashlight. The trial court properly suppressed the evidence obtained in the search of Rose's home, in that the search warrant for the home was based on illegally obtained evidence.

[Some text, citations, and footnotes omitted; officer's name deleted]

(4) No PC On Landlord's Statement Alone

Rejecting the State's argument that the landlord's statement about his observations, taken alone, established probable cause, the Court explains:

> The State contends that even if the information learned from an illegal search by the police officer is suppressed, the search warrant is not invalid because Yarton's statement that he believed he smelled marijuana near the shed was sufficient to establish probable cause for the issuance of the warrant. We disagree.
>
> . . . Yarton's suspicion that Rose was engaged in criminal activity is insufficient to establish probable cause.
>
> . . .

> We believe that the naked assertion by Yarton that he believed he smelled marijuana, without more, would not lead a reasonable person to conclude that Rose was involved in criminal activity. Even such bare assertions by police officers are not sufficient. The police must provide information from which a disinterested magistrate could conclude that, based on the officer's training and experience, what the officer believed to be the odor of marijuana probably was marijuana. . . . Accordingly, we find the warrant cannot be upheld on Yarton's statement alone. The warrant fails entirely.

[Some text, citations and footnotes omitted]

DISSENTING OPINION

Judge Agid takes issue with the majority judges' "open view" analysis, particularly their suggestion that use of a flashlight under the circumstances of this case was unlawful. After extensive analysis on the "open view" issue, Judge Agid concludes as follows:

> I cannot agree with the majority's conclusions that, standing alone, the use of a flashlight from a lawful vantage point constitutes "a particularly intrusive method of viewing", in light of the fact that the use of binoculars has been approved in other cases.
>
> Furthermore, no case either the majority or I have found has held on facts even remotely similar to these that using a flashlight to "pierce the nighttime darkness" under circumstances where there would be no legitimate expectation of privacy during the daylight hours takes an officer's actions out of the open view doctrine and converts them into a search. I would decline to do so and would reverse the trial court and remand the case for trial.

[Citation omitted]

LED EDITOR'S COMMENTS:

1. Open View Issue. This is a very gray area of the law. An officer does not invade a home occupant's right to privacy by approaching the house through access areas used by members of the public. And generally, there is no problem if the officer uses a flashlight to light the way as he or she proceeds through the curtilage in approaching an access door to contact the occupant. However, we feel that shining a flashlight into living areas of the home is a big step up in terms of intrusion into possible privacy rights. We see a big difference between: (1) on the one hand, using binoculars while hiding

in an otherwise lawful vantage point and watching something that one could have lawfully observed from a closer "open view" vantage point without binoculars, but for the need to maintain one's cover [THIS IS CLEARLY LAWFUL CONDUCT UNDER CASE LAW -- see e.g., State v. Jones, 33 Wn. App. 275 (Div. I 1982) Feb. '83 LED:13]; and (2) on the other hand, using a flashlight or night vision device to observe, from the same lawful vantage point what is going on inside protected private living area and what cannot be observed from any non-intrusive vantage point without the night vision device [THIS SUB-AREA HAS LITTLE CASE LAW]. In the case of use of the binoculars, the occupant's claim of an expectation of privacy is unreasonable because observations of his or her activity could have been made without intrusion and with the naked eye if the officer had not wished to maintain his or her cover, i.e., anyone walking by might have made the same observation. On the other hand, in the case of use of the flashlight or night vision device, the occupant's claim of an expectation of privacy seems more reasonable because observations into the protected area are possible only through use of the flashlight or night vision device.

2. Landlord Consent Issue. The majority may be correct that the landlord lacked authority to consent to the search here. It is a close question that depends on analysis of whether Rose had assumed the risk of such an entry when he had agreed to allow the landlord on the property for the purposes noted. What we believe suggests a clearly erroneous approach by the majority, however, is the declaration, not included in the excerpt above, that the landlord "had no actual authority to consent to a police search of the property." (Emphasis added) If this were the third party consent standard, consent authority would never be found. Whether third party consent authority is based on a family relationship, a business relationship, a living arrangement, or other circumstances, it is extremely unlikely that the question of authority to consent to a police search will have been expressly addressed in communications between the 1st and 3rd party. Fourth Amendment third party consent doctrine does not require that police access have been expressly discussed betweeen the 1st and 3rd party. Rather, the doctrine looks at reasonable expectations of access by any outsider, not just by the police . . .. Having said this, we suggest nonetheless that the best approach in any residential landlord-tenant situation where the tenancy is still covered by a lease, regardless of any provisions in the lease about the landlord's right of access to the residential premises, is to assume that the landlord cannot consent to a search.

3. Landlord Statements As PC. If private citizens say that they think they smelled or saw marijuana growing in a protected private area and officers wish to turn these observations into probable cause, the officers have at least three choices for action, all of which may be pursued at the same time: (1) inquire in detail as to the citizen-observers' experiences with marijuana; (2) show the citizens pictures

or expose them to the smell (if possible) to corroborate their conclusions; and/or (3) pursue other investigative leads to try to corroborate suspicions as to the "grower."

VIOLATION AT JAIL OF DUI ARRESTEE'S RIGHT TO INDEPENDENT BREATH OR BLOOD TEST REQUIRES DISMISSAL -- JAILERS SHOULD HAVE EXPLAINED RIGHT TO 2ND TEST

State v. McNichols, 76 Wn. App. 283 (Div. III, 1994)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> At 11 p.m. on April 13, 1991, Washington State Patrol Trooper Pete Powell stopped Mr. McNichols after observing him drive through a stop sign at about 45 miles per hour. Mr. McNichols seemed intoxicated. When Mr. McNichols failed several field sobriety tests, Trooper Powell arrested him for driving under the influence of liquor and transported him to the Public Safety Building for a breath test.
>
> Mr. McNichols was advised of the consequences of refusing to take the breath test, and of his rights to consult an attorney and to have an additional test administered by a qualified person of his own choosing. He spent 20 minutes trying to telephone his father, then telephoned the on-duty public defender. Afterward, Mr. McNichols submitted to the breath test. The first sample, taken at 12:09 a.m., registered .26 and the second sample, taken at 12:13 a.m., registered .24. Mr. McNichols was then turned over to the Spokane County Jail for booking.
>
> There is an unresolved dispute whether Mr. McNichols told Trooper Powell he wanted an additional test, but there is no dispute that he requested a blood test from jail officials by 12:30 a.m. At his insistence his request was noted on the jail's processing form. Jail personnel did not administer a blood test, did not expedite the booking and release process so he could leave to obtain one, and did not inform Mr. McNichols that he could have someone come to the jail to administer a test; however, Mr. McNichols had free access to the telephones from 12:30 until 1:45, and he spoke with an attorney before taking the breath tests.
>
> At approximately 1:45 a.m. it was determined that Mr. McNichols qualified for release on his own recognizance on condition he could arrange transportation. He called a friend to give him a ride home. Mr. McNichols received his personal effects at 2:38 a.m. and left with the friend at

approximately 3 a.m. At that time he decided not to seek an additional test because he believed too much time had elapsed for it to be effective. The amount of time he was in custody was apparently normal, due to the paperwork to be completed and the fact it was a weekend night.

Mr. McNichols moved to either suppress the BAC results or to dismiss the charge on the basis the State unreasonably interfered with his efforts to obtain a blood test. Noting that RCW 46.61.506(5) permits admission of the State's BAC evidence even when the defendant fails or is unable to obtain an additional test, but that case law proscribes the State from frustrating a defendant's attempts to obtain an independent test, Blaine v. Suess, 93 Wn.2d 722 (1980)**[Sept. '80 LED:02]**; State v. Reed, 36 Wn. App. 193 (1983) **[May '84 LED:07]**, the District Court concluded the State was not responsible for Mr. McNichols' failure to obtain a test. The court denied both motions. On June 24, 1992, the case was submitted to the court on the record. The court found Mr. McNichols guilty, sentenced him, and stayed his sentence pending appeal.

On appeal to the Superior Court, Mr. McNichols contended the State had an affirmative duty to take reasonable steps to ensure that he had an opportunity to exercise his statutory right to an additional test. He argued the failure of the jail officials to administer a blood test, or to expedite processing so that he could obtain his release and timely seek his own test, or at the very minimum to inform him he should call someone to come to the jail to administer a test, frustrated his efforts to exercise his right. He further argued dismissal was the appropriate remedy for the violation.

The Superior Court held the State did not have an affirmative duty to administer a blood test or otherwise take action to help Mr. McNichols obtain one, but it did have a duty to inform him that he would be processed normally and that if he wanted a blood test, it was his responsibility to use the available telephones and make the necessary arrangements. The court dismissed the charge and denied the State's motion for reconsideration.

ISSUE AND RULING: Did jail personnel violate McNichols' right as a DWI arrestee under Title 46 RCW to obtain a separate breath or blood test? (ANSWER: Yes) Result: affirmance of Spokane County Superior Court decision: (1) reversing Spokane County District Court DUI conviction and (2) dismissing charges.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The right of a DWI arrestee to have an additional scientific test of his own choosing is secured by statute. RCW 46.61.506(5); RCW 46.20.308(2). The right of a defendant to gather possibly exculpatory evidence is secured by constitutional standards of due process." [T]he question of whether an accused was afforded a 'reasonable opportunity' to gather evidence in his own defense depends heavily on the particular circumstances."
>
> In Blaine [v. Suess, 93 Wn.2d 722 (1980)], the defendant requested additional tests after submitting to a Breathalyzer test. The administering officer informed the defendant he would be transported to a hospital for the tests. Instead, he was taken to jail. On the way, he renewed his request for a blood test. The court concluded the defendant did everything a reasonable person could do under the circumstances to implement his right to an additional test. Since the defendant was in custody, he had no realistic opportunity to be tested except by stating his request to the authorities. The court held the police unreasonably interfered with the defendant's effort to procure probative evidence, reversed the conviction and dismissed the case.
>
> Here, Mr. McNichols requested an independent test while being booked into jail. He had no realistic opportunity to be tested while in custody except by stating his request to the authorities and relying upon their assistance. The booking officer told him the jail does not administer tests and he should have made his request to the arresting officer. [COURT'S FOOTNOTE: Mr. McNichols swore he did so; Trooper Powell swore he did not.] The booking officer then apparently told Mr. McNichols he could use the telephones to arrange for a test once he was released from the facility. By leading Mr. McNichols to believe he was too late to obtain a test through the arresting officer and could not otherwise obtain a test until after his release, the booking officer unreasonably interfered with Mr. McNichols' right to gather evidence.
>
> **The jailers had a duty to inform Mr. McNichols that they were not required to help him obtain a test, but that he could have someone come to the jail to administer a test and he could use the telephones to make necessary arrangements if that is what he wanted.** Requiring jailers to impart such information is similar to requiring them to provide a list of on-call public defenders and their telephone numbers to

> DWI arrestees, in addition to telephone access, to give effect to the right to counsel. The requirement is easily implemented and addresses the reality of the situation. It is disingenuous for the State to claim an arrestee has a reasonable opportunity to exercise his right to obtain an additional test when he is jailed during the critical time period, cannot leave to transport himself to a testing facility and does not know that he can have someone come to the jail to administer a test.
>
> The State contends jail personnel are not responsible for implementation of the implied consent statute, RCW 46.20.308, which directs the behavior of law enforcement officers, and argues there are important policy reasons for requiring DWI arrestees to direct their requests for independent tests only to the law enforcement officers who arrest them. The prohibition against frustration of an accused's attempt to obtain relevant evidence is derived from the constitutional right to due process and a fair trial; it applies to all government employees. A DWI arrestee is in custody of agents of the State, whether they are police officers or jail officials, and has limited ability to obtain a test. The statutory right to an additional test is worthless if an individual cannot obtain it; to force DWI arrestees to obtain the test through the police or forgo it altogether would eviscerate the right.

[Some citations omitted; emphasis added]

LED EDITOR'S NOTE: The Court also holds that the dismissal of charges, not mere suppression of the State's breath test results, is the appropriate remedy when the State has denied a person of his right to an additional breath or blood test, as here.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **PC THAT PERSON IS GROWING MARIJUANA IN A HOUSE AT ANOTHER LOCATION IS NOT NECESSARILY PC TO SEARCH THAT PERSON'S RESIDENCE** -- In State v. Olson, 73 Wn. App. 348 (Div. II, 1994) the Court of Appeals upholds the conviction of David Olson for growing marijuana even though the Court holds that certain evidence seized under a search warrant should have been suppressed by the trial court as the product of an unlawful search.

In July of 1991, police developed probable cause to believe that David Olson was involved in a marijuana-growing operation at one house (the GROW HOUSE) in Port Orchard. Police learned further that David Olson

lived at another house (the RESIDENCE) in Port Orchard. They also knew that Olson had been arrested in 1990 for possession of a pound of marijuana.

Based on the probable cause to search the GROW HOUSE, plus the lead officer's statement that his training and experience supported a search of the RESIDENCE [see quote in bold in first paragraph of excerpt, below, this page], separate warrants were issued to search each of the houses. Marijuana and other incriminating evidence were found in each of the two houses. Olson lost suppression motions in Superior Court, and he was convicted of manufacturing marijuana.

The Court of Appeals holds that police had probable cause to search the GROW HOUSE, but not the RESIDENCE. The Court's analysis supporting its view that police did not have PC to search the residence is as follows:

> The State contends that there was also probable cause to support issuance of a warrant to search the buildings at 11452 Fairview, the residence of David Olson. In our judgment, the magistrate abused his discretion in issuing this warrant based on the information presented in the affidavit. The principal piece of evidence supporting the issuance of this warrant was Moss's statement, which he based on his training and experience, that individuals who cultivate marijuana commonly "hide marijuana, the proceeds of marijuana sales, and records of marijuana transactions in secure locations, 'safe house' or within the premises under their control . . . not only for ready access, but also to conceal them from law enforcement personnel".
>
> An officer's belief that persons who cultivate marijuana often keep records and materials in safe houses is not, in our judgment, a sufficient basis for the issuance of a warrant to search a residence of a person connected to the grow operation. If we adopted the position urged on us by the State we would be broadening, to an intolerable degree, the strict requirements that there be probable cause to believe that evidence of a crime will be discovered at a certain location. We conclude that, standing alone, an officer's belief that grow operators hide evidence at other premises under their control does not authorize a warrant to search those places.
>
> The State points to the additional fact that David Olson was present in the brick building at 12295 Madrona, the location of the marijuana grow operation, for 30 minutes on July 24, 1991, and the fact that Olson's car was later seen parked at 11452 Fairview. Those facts, however, are merely innocuous

details, and do not provide support for a probable cause determination.

The Court of Appeals goes on, however, to hold that the evidence seized under the warrant for the search of the GROW HOUSE was sufficient to support Olson's conviction for manufacturing marijuana.

Result: Kitsap County Superior Court conviction for manufacturing marijuana affirmed.

LED EDITOR'S COMMENT: The PC issue addressed in Olson is a close one. Other courts may find PC based on similar assertions by officer-affiants about "training and experience" as to "safe houses" etc. Nonetheless, narcotics officers should keep the Olson ruling in mind, and they should do their best to gather corroborating evidence to link the suspected "safe house" to the known grown operation.

(2) **POLICE LACK INDEPENDENT AUTHORITY TO MAKE AGREEMENT NOT TO PROSECUTE --** In State v.Reed, 75 Wn. App. 742 (Div. I, 1994) the Court of Appeals rejects defendants argument that he should not be prosecuted because of an alleged agreement that he had made with the police that he would not be prosecuted for certain drug sales if he acted as a confidential informant. The prosecutor's office was not involved in the alleged agreement. Consistent with decisions in other jurisdictions, the Court of Appeals declares that police officers have no authority to make prosecutorial decisions or to make an enforceable agreement with a criminal defendant to not prosecute for an offense without first obtaining the consent or approval of the prosecutor. Accordingly, because the prosecutor was not involved in the alleged agreement, it was unenforceable, and defendant was properly prosecuted regardless of what agreement, if any, the police had made with defendant.

Result: Snohomish County Superior Court convictions for delivery of a controlled substance (three counts) affirmed.

(3) **PROSECUTOR MAY NOT INSTRUCT A WITNESS NOT TO SPEAK WITH A DEFENSE ATTORNEY IN PROSECUTOR'S ABSENCE --** In State v. Hofstetter, 75 Wn. App. 390 (Div. II, 1994) the Court of Appeals addresses an appeal arising out of the 1991 Orting jackpot convenience store murder. After two of the murderers had pleaded guilty, the prosecutor's office advised the two: (1) that they were not to talk to defense counsel for the other two alleged participants without the prosecutor being present, and (2) that if they did talk to defense counsel in the prosecutor's absence, then the plea agreements could be withdrawn.

The Court of Appeals declares that a prosecutor generally cannot lawfully instruct a witness not to talk to defense counsel alone. The prosecutor can do nothing more than advise witnesses that they may

choose whether to talk to defense counsel, and they may choose who to have present with them if they do choose to talk to defense counsel. Here, the prosecutor's instruction and threat was unlawful, the Court holds. However, the error was harmless, the Court rules, in light of what defense counsel was able to learn in the interview which did occur with the prosecutor present.

Result: Pierce County Superior Court convictions of Ansel Wolfgang Hofstetter and Dwayne Satterfield for aggravated first degree murder affirmed.

(4) **THREE-YEAR-OLD VICTIM'S STATEMENTS TO SOCIAL WORKER ADMISSIBLE UNDER ER 803(a)(4)'S HEARSAY EXCEPTION FOR "STATEMENTS MADE FOR MEDICAL DIAGNOSIS AND TREATMENT"** -- In State v. Florczak, 76 Wn. App. 55 (Div. I, 1994) the Court of Appeals rejects defendant's appeal from his convictions for sexual exploitation of a minor and first degree child molestation.

Critical evidence against defendant was testimony of a social worker who had interviewed the alleged victim, a three-year-old. Defendant argued that the social worker's testimony about these conversations was inadmissible hearsay because it did not qualify under the exception of Evidence Rule (ER) 803(a)(4) for "statements made for medical diagnosis and treatment." His argument focused on the child's state of mind. Defendant argued that the "medical diagnosis and treatment" hearsay exception requires that the out-of-court statement be made by a person who understood at the time that questions were being asked to help with diagnosis and treatment.

The Court of Appeals rejects the argument that the fact that a child could not understand the purpose behind questions asked was to further medical diagnosis or treatment does not preclude admission of the child's answers under the ER 803(a)(4) hearsay exception, so long as: (1) corroborating evidence supports the child's statements, and (2) it appears unlikely that the child would have fabricated the story. The Court goes on to hold that there was sufficient corroborating evidence to admit the child's statements under the facts of this case, explaining:

> First, KT's young age indicates that she likely had no reason to fabricate the nature of the abuse, and thus, it is not critical that she understood that her statements to Wilson would facilitate her treatment. In addition, as she revealed the abusive incidents to Wilson, KT was very fearful when talking about Terrell and Florczak; she was not fearful when talking about the Kleins; she spontaneously said she had "bad secrets" involving Terrell and Florczak; she became very upset, ran around the room, and hid under a table while discussing the specific incidents of abuse; and

> she was very worried for the Kleins' and Wilson's safety after she reported the abuse. Those behaviors indicate a range of emotions that would be extremely difficult, if not impossible, for a 3-year-old to consciously invent and then convincingly portray. They indicate that KT was genuinely revealing what she believed had happened to her and that her statements were trustworthy. Thus, KT's emotional state and behaviors while she made the statements to Wilson sufficiently corroborate those out-of-court statements for admission under ER 803(a)(4)."

[Footnotes, citation omitted]

Result: King County Superior Court convictions for sexual exploitation of a minor and first degree child molestation affirmed.

LED Cross-Reference Note: For a similar interpretation of ER 803(a)(4), see the next LED entry of Dependency of M.P. See also a prior LED entry on a decision similarly interpreting ER 803(a)(4) in State v. Ashcraft, 71 Wn. App. 444 (Div. I, 1993) Feb. '94:14.

(5) **FOUR-YEAR-OLD'S STATEMENT TO SEX ABUSE THERAPIST ADMISSIBLE UNDER ER 803(a)(4)'S HEARSAY EXCEPTION FOR "STATEMENTS MADE FOR MEDICAL DIAGNOSIS AND TREATMENT"** -- In Dependency of M.P., 76 Wn. App. 87 (Div. I, 1994) the Court of Appeals rejects a father's appeal from a dependency action court order limiting his contact with his children.

Important evidence in the case were statements made to a sex abuse therapist by the defendant's four-year-old child. Among the challenges by the father to admissibility under ER 803)(a)(4) of the therapist's testimony regarding the child's statement were arguments: (1) that the exception of ER 803(a)(4) for statements made for medical diagnosis and treatment applies only to statements to medical doctors; and (2) that the child's statements to the therapist were unreliable and insufficiently corroborated. The Court of Appeals rejects both arguments.

On the first challenge, the Court points out that past cases have applied ER 803(a)(4) to statements to social workers, and statements to sex abuse therapists are covered as well.

As to the second argument the Court explains why it believes that the child's statement was sufficiently corroborated. The Court explains as follows that there was evidence that the four-year-old knew why she was seeing the counselor:

> In this case Smith initially explained to J that she was being seen because her mother was concerned about her being unhappy. J volunteered an account of what had happened to her mother in the

> test, and then gave a separate account of what her father had done to her. J told Smith it was "more better" now that she visited her dad only by telephone. In the sessions that followed, she gave consistent, specific responses to Smith's nonleading reminders of her initial disclosures. She returned often to the topic of her fear of her father and she explained how she was going to lock her door to keep him out of the room. Smith, trained to assess the reliability of children's statements, saw no indication of coaching or fabrication, and observed that J "really uses her time well when she comes into therapy". From this, the trial court could reasonably conclude that J understood the purpose of her meetings with Smith well enough to appreciate Smith was there to help her deal with the fears caused by her father's contacts with her. Admitting the statement was proper under the circumstances.

The Court then goes on to explain as follows that even if the child did not understand why she was seeing the therapist, there was sufficient corroboration of the reliability of the statement to make it reliable and hence admissible:

> The evidence corroborating J's verbal disclosures included her demonstration of how her father jumped on her, her unusual focus on genital areas when a Child Protective Services social worker gave her maps of female and male bodies to color on, as well as incidents of genital touching with her sisters and brother following visits with the father.
>
> While J's behavior was not as heavily sexualized as the conduct reported in In re S.S. **[a decision in a prior dependency case not reported in the LED - Ed.]**, it was sufficient to corroborate her statements to Smith, and it was unlikely she would fabricate a story about her father's sexual molestation to explain why she feared him. Under Butler **[a decision in a prior assault-of-a-child case not reported in the LED -- Ed.]** these circumstances establish the reliability of a child's statement sufficiently to permit admission under ER 803(a)(4).
>
> As shown by the findings of fact, the trial court was fully aware that J made her statements close in time to the dissolution proceedings between her parents. The medical diagnosis or treatment exception does not require special scrutiny for statements made in this context.

Result: King County Superior Court dependency ruling limiting the father's contacts with his children affirmed.

(6) **EVIDENCE LAW: CHILD WITNESS COMPETENCY, CHILD SEX ABUSE HEARSAY ADMISSIBILITY ADDRESSED** -- In State v. Pham, 75 Wn. App. 626 (Div. III, 1994) the Court of Appeals rejects defendant's claim that the trial court erred: (1) in admitting the testimony of the nine-year-old victim, and (2) in allowing adult witnesses to testify to hearsay statements that the victim had made.

CHILD WITNESS COMPETENCY: On the issue of the child's competency as a witness, the Court of Appeals holds that the trial court had made no error in allowing the child to testify under the rule for competency of child witnesses, which rule requires:

> (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

[Citations omitted]

CHILD SEXUAL ABUSE VICTIM HEARSAY: On the issue of the admissibility of family members testimony about out-of-court statements the child had made to them about the charged sex abuse, the Court of Appeals holds that the trial court made no error in allowing the family members to testify under RCW 9A.44.120, the statute for admissibility of hearsay statements of child sex abuse victims. The Court of Appeals explains the basic requirements under the statute:

> In determining the reliability of out-of-court declarations, the trial court is to examine:
>
> > "(1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness."
>
> The court is also to consider:
>
> > (1) the statement contains no express assertion about past fact, (2) cross examination could not show the declarant's lack of knowledge, (3) the possibility of the declarant's faulty recollection is remote, and (4) the circumstances surrounding the statement . . . are

> such that there is no reason to suppose the declarant misrepresented defendant's involvement.

Analyzing the record, the Court of Appeals explains its affirmance of the trial court's ruling:

> Here, the court considered that T.T. had no motive to lie and more than one person heard the statements. The court noted T.T.'s general character was good and there was a great deal of similarity between the statements she made to different family members. The court noted there was no reason to suppose T.T. misrepresented Mr. Pham's involvement. It considered the timing of the declarations and the absence of any indication T.T. disliked Mr. Pham before the incident.
>
> The court discussed, in turn, each of T.T.'s statements about the incident to family members. The disclosures were spontaneous. The time, content and circumstances of the statements provided sufficient indicia of reliability.
>
> Mr. Pham argues that because there was no corroboration, the statements were not reliable. We disagree. T.T. was competent to testify. If a child victim is available to testify as a witness, corroboration of the out-of-court statements is not a prerequisite to their admissibility.

Result: Spokane County Superior Court convictions for first degree child rape and first degree child molestation affirmed.

(7) **CHILD SEXUAL ABUSE HEARSAY STATUTE ALLOWS THE HEARSAY EVEN IF THE CHILD TESTIFIES** -- In State v. Bedker, 74 Wn. App. 87 (Div. I, 1994) the Court of Appeals rejects defendant's challenge to the trial court's admission of adult testimony as to a child sex abuse victim's hearsay statements, where the child had also testified. Defendant's theory is described by the Court of Appeals as follows:

> Bedker alleges there is no legitimate purpose in allowing adults to repeat the prior consistent statements of a child witness which allege sexual misconduct. Although Bedker concedes that M's statements fall within the child hearsay exception, RCW 9A.44.120, he argues the statements are inadmissible because they merely served to bolster the child's testimony, and as such were cumulative and unduly prejudicial.

The Court of Appeals responds to defendant's argument in part as follows:

RCW 9A.44.120 specifically allows the admission of child hearsay under these circumstances. The purpose of the child hearsay statute was set forth by our State Supreme Court in State v. Jones, 112 Wn.2d 488 (1989)**[Oct. '89 LED:16]**:

> RCW 9A.44.120 is principally directed at alleviating the difficult problems of proof that often frustrate prosecutions for child sexual abuse. Acts of abuse generally occur in private and in many cases leave no physical evidence. Thus, prosecutors must rely on the testimony of the child victim to make their cases. Children are often ineffective witnesses, however. Feeling intimidated and confused by courtroom processes, embarrassed at having to describe sexual matters, and uncomfortable in their role as accuser of a defendant who may be a parent, other relative or friend, children often are unable or unwilling to recount the abuses committed on them. In addition, children's memories of abuse may have dimmed with the passage of time. For these reasons, the admissibility of statements children made outside the courtroom, and especially statements made close in time to the acts of abuse they describe, is crucial to the successful prosecution of many child sex offenses.

. . .

Admissibility under the statute is not based on mere repetition, it is based on repetition under circumstances indicating the reliability of the statement. . . .

Though evidence may be admissible under the child hearsay statute, the inquiry does not stop there. These statements, like any other evidence, are subject to analysis under ER 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The decision to limit the testimony lies within the discretion of the trial court.

The Court of Appeals goes on to explain that there was no abuse of discretion in admitting the adult testimony containing some of the hearsay statements in this case.

Result: Snohomish County Superior Court convictions for first degree statutory rape (former statute) and first degree rape of a child (current statute) and first degree rape of a child (current statute), as well as exceptional sentence (180 months on each count to be served concurrently), affirmed.

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The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions express the thinking of the writer and do not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.